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INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION

LESLIE MACLEOD

Materials Prepared by Tanya Wacyk

Faculty of Law

University of Toronto

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New York University Law Review
June, 1989

*493 BARGAINING AND THE ETHIC OF PROCESS

Eleanor Holmes Norton [FNa]

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Bargaining is ubiquitous, but according to what ethic does bargaining proceed? Bargaining, Professor Norton finds, has been sustained by an intrinsic functional ethic. The operational necessities of the bargaining process yield an ethical 'functionalism' that results in the minimal truthfulness and fairness necessary for an agreement. Professor Norton turns to legal analogies to demonstrate how process characteristics influence ethical behavior. Using the concepts of misrepresentation and unconscionability, she shows that both legal doctrine and legal ethics adjust their rules to accommodate the operational needs of the bargaining process. Experience with labor and divorce law reveals that this deference to process continues even when external regulation of bargaining occurs. Professor Norton's analysis supports the use of legal intervention in special cases, so long as such intervention is tailored to meet discrete bargaining abuses. She leaves for the future the next essential step--the development of an aspirational bargaining ethic that rises above the ethical minimalism of functionalism but that nonetheless incorporates a functional understanding of the bargaining process.

*494 INTRODUCTION

Bargaining, [FN1] perhaps the oldest of decision-rendering processes, has taken on new life as scholarly [FN2] and popular [FN3] writing alike have encouraged penetrating examination and increased use of an already widespread process. The burgeoning interest in negotiation, however, has only begun to spark interest in the ethical dilemmas [FN4] inherent in many negotiation strategies and tactics. [FN5] The heightened interest in negotiation *495 points up the need for new knowledge about the ethics of an old process. [FN6] This Article is an examination of the sources of major ethical dilemmas in bargaining [FN7] and of the way that the process resolves them in the absence of an aspirational ethic. [FN8]

The pervasive use of bargaining is reason enough for an examination of bargaining ethics. Negotiation is used more often than any other discrete dispute resolution or problem-solving process. [FN9] Bargaining is an essential process in everyday life; in many situations, particularly common business deals, there are no real alternatives. However, negotiation is critical to both dispute resolution and consensus-building alike. [FN10] In addition, the versatility of bargaining makes it useful in resolving issues of all kinds and dimensions, whether matters of global importance, such as nuclear arms limitations, or of personal concern, such as custody following divorce. Not surprisingly, however, interest in negotiation has been primarily in strategy, divorced from ethical, legal, and other implications.

In legal disputes in particular, negotiation is often the only realistic option either because of the time and expense of litigation or because negotiation is the real preference of the parties. However, negotiation is only one of a growing variety of alternatives to litigation that substitutes for decisions by courts. [FN11] The need to address ethical concerns in negotiation *496 is especially acute because negotiation, not litigation, determines the outcome of most disputes. [FN12]

Processes controlled by neutrals are used to resolve few disputes, including disputes brought before courts, which allow and even encourage parties to retrieve their cases and resolve them on their own through negotiation. [FN13] In effect, litigation is the alternative to bargaining. *497 More often than not, litigants use courts as bargaining

leverage, rather than as decision makers. Individual preference or concern with efficiency, cost, or other aspects of more formal dispute resolution often lead parties to attempt resolution of their own problems. [FN14]

In legal disputes, in particular, ethical issues combine with the unstructured nature of the process to make negotiation susceptible to criticisms that have sometimes been made of other alternatives to litigation. [FN15] Negotiation, like other forms of informal dispute resolution, [FN16] raises controversial questions of whether power or status, in the absence of formal adjudication, may impinge upon outcomes. [FN17] When the unique ethical questions that surround negotiation are added, these power and status disparities may be exacerbated. Without lawyers, judges, courts, and law, disputants are not assured of a principled resolution. [FN18] Whether in disputes or in transactions, the poor, poorly informed, or those otherwise disadvantaged in relation to their opponents often will not have the protection of the law and its institutions. [FN19] Unequal bargaining power may *498 impinge unfairly upon the outcome of a negotiation, not only for disadvantaged parties but for others who, in a particular negotiation, are less powerful than their opponents. [FN20] Erosion of public law and of the rights it protects could occur in a system of private bargaining of disputes, which is not exposed to public scrutiny. [FN21] Developing areas of the law, especially those affecting poor and other disadvantaged disputants, could be truncated. [FN22] Individuals might be more inclined to settle their claims, leaving in place systemic problems affecting others similarly situated. [FN23] *499 Settled disputes or negotiated transactions might be more difficult to make final and to enforce. These problems can only be exacerbated by indeterminate ethics in negotiation. [FN24]

At the same time, powerful arguments against alternatives have not diminished their importance or their use. [FN25] Alternatives have proliferated without proof of their effectiveness. [FN26] The pressure for the use of *500 negotiation and other less formal processes has mounted because of the perception that formal approaches do not always function effectively in the complicated environment of modern transactions and disputes. [FN27]

Negotiation demands particular attention because it is the most ubiquitous and accessible of the informal processes. Unlike other alternatives, negotiation requires neither institutional support nor recognition. [FN28] It is always available to the parties, not only in litigation, but far more often in the countless circumstances when there is a mutual desire to bargain for a solution. The accessibility of the process is one of its most compelling features. Even so, today negotiation is aggressively marketed, [FN29] and decisions reached through private bargaining will almost certainly continue to increase. The ethical dimension of a process so essential and so often used requires attention.

An analysis of the ethics of bargaining must take account of an extraordinary variety of behaviors, contexts, and goals. These complicated interactions give rise to visions of ethics that are subjective and inconsistent. Truthfulness and fairness, two core ethical values, are both extolled and ridiculed in bargaining. Attempts to unravel dilemmas and to avoid abuses, such as misrepresentation, too often must proceed case-by-case without any coherence. Often there is confusion as to whether particular tactics are undesirable because they are unethical or because they are distasteful. Ad hoc and sometimes inconsistent prescriptions for appropriate ethics do not help. This experience reveals the need for an understanding of how common ethical notions fit this special process. In the end, a negotiating ethic is unlikely to prove useful unless it is at once functional and ethically sound. This challenge requires an analysis that begins with the process itself.

This Article takes the view that the structural features of bargaining and the dynamic of the process support an analytical model that helps to *501 explain how ethical values operate in a private, adversarial market process controlled by the parties. The model developed here suggests that minimal truthfulness and fairness are functional ethical norms inherent in bargaining. The truthfulness and fairness associated with the process do not meet aspirational standards, but the practices that result do meet the minimal ethical requisite of an agreement. These practices also account for the universality and longevity of the process despite the absence of a consensus concerning an aspirational ethic. [FN30] The resulting functionalism links bargaining ethics to the function they perform without assuming that the ethics that result are sufficiently aspirational in sorting out deception and unfairness. Thus, the functionalist model is not offered as an alternative to aspirational approaches. Rather, the assumption is that an adequately articulated aspirational ethic for bargaining must be preceded by an understanding of how the process operates in the face of ethical challenges.

Part I of this Article discusses the role of ethics in negotiation and argues that although ethical decision-making is an important aspect of bargaining, deviations from ethical norms can be justified only by reference to acceptable criteria. This Part then describes two core ethical norms, truthfulness and fairness, that will be used to analyze the

operation of ethics in bargaining.

Part II first offers and evaluates four possible aspirational conceptions of negotiating ethics and argues that such approaches standing alone are inadequate because they do not take sufficient account of the special operational aspects of the process into which ethical considerations must fit. This Part then offers an analytical model called functionalism for evaluating negotiation ethics. This 'process model' relies on the characteristics and operational imperatives of the bargaining process itself, and thus provides an objective rather than a value specific basis for assessing bargaining ethics. As an analytical model, functionalism helps in understanding the minimal ethical needs of classical bargaining practices but is not a replacement for indispensable ethical standards. Functionalism reveals a non-aspirational internal ethic and shows how bargaining, as traditionally structured and practiced, [FN31] assumes that adversarial strategic actions will promote minimal truthfulness and fairness. Functionalism describes how the process receives and sorts ethical values using its own internal mechanisms--its market and adversarial features and its use of bargaining techniques.

Part III draws upon the treatment of deception and unfairness in law to demonstrate how the functionalist model arrives at truthfulness *502 and fairness in bargaining. Using the doctrines of misrepresentation and unconscionability as proxies for deception and unfairness, this Part shows that legal doctrine accommodates the market and operational needs of the negotiation process while at the same time upholding the minimal truthfulness and fairness necessary for a valid agreement. Part III then tests functionalist assumptions concerning truthfulness and fairness in bargaining in two areas: divorce law and labor law. These areas reveal a documented pattern of law that accommodates the ethical values of truthfulness and fairness to the structural and operational needs of bargaining. Part III argues that this experience both illuminates and validates the functionalist model because, despite strong policy reasons to intervene, both divorce and labor law expose a striking reluctance to curtail bargaining practices that may otherwise be met by the parties through bargaining techniques. This Part concludes that statutory intervention aimed at specific problem areas, such as those identified in labor law and family law, would more effectively address policy concerns than a wholesale manipulation of bargaining or its intrinsic ethic.

I.

IDENTIFYING NEGOTIATION ETHICS

A. Challenges of the Process

In many areas of human endeavor practice and principle are often estranged. But the distance between practices that are commonly used and acceptable ethical standards is particularly great in negotiation. [FN32] *503 Much of the estrangement can be attributed to practices that some negotiators regard as purely strategic and necessary for bargaining or to practices that are viewed as essential to represent a client with the requisite dedication.

Of course, bargaining often occurs without abuse and with a deliberate pursuit of fairness. In a rare empirical study of bargaining attitudes and techniques, for example, insurance adjusters were found to have a strong sense of fairness toward claimants. [FN33] Even when this is not the case, it is difficult to quarrel with the notion that 'even the grossest of sheer interest conflicts are hedged by standardized concepts of customary behavior, market price, status and reputation, honor, toleration, and the like.' [FN34] But since abuse surely occurs, this self-evident view of human behavior in negotiations leaves open important questions about the nature of bargaining abuse and the appropriate way to confront it in light of the unique features and mechanics of the negotiating process. Today, for the most part, questions of ethics in bargaining are determined by the personal ethics of the parties because objective sources are generally unavailable. [FN35]

Negotiation is dominated by process and technique, unguided by any specific consensus as to how ethical standards and norms should be applied to a process that tolerates the disguising of intentions and the use of pressure tactics. The paradigm for this Article is traditional hard bargaining using offers and counteroffers because it is probably the most commonly used bargaining strategy. [FN36] Some forms of bargaining, of *504 course, are more benign and eliminate many ethical concerns. [FN37] Even in the most cooperative and problem-solving approaches, however, there are usually some oppositional exchanges in which deception and pressure play a role. [FN38] Consequently, normal ethical standards are sometimes abandoned in negotiations the way they are in driving. Just as people

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***1219 THE ETHICS OF LYING IN NEGOTIATIONS [FNd]**

Gerald Wetlaufer [FNa]

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